Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. ~~76~~ 76-1766

SUNSET SCAVENGER COMPANY AND
GOLDEN GATE DISPOSAL COMPANY,
Petitioners,

vs.

WILLIAM ROBERTS, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners Sunset Scavenger Company (Sunset) and Golden Gate Disposal Company (Golden Gate) respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *William Roberts et al. v. Golden Gate Disposal Company, Sunset Scavenger Company et al.*, No. 75-3114 below.

OPINIONS BELOW

The memorandum of the Court of Appeals in *Roberts v. Golden Gate Disposal,* not reported, is set forth in Appendix A. In deciding *Roberts,* the Court of Appeals expressly adopted the reasoning of the companion case of *Gay v. Waiters and Dairy Lunchmen's Union, Local No. 30,* No. 75-2197, decided March 11, 1977, which is set forth in Appendix B.

The Order of the District Court in *Roberts,* not reported, is set forth in Appendix C. The District Court, in deciding *Roberts* adopted his reasoning in *Gay v. Waiters and Dairy Lunchmen's Union, Local No. 30,* 10 FEP Cases 864 (N.D.Cal. 1975), which is set forth in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1977, reversing and remanding the judgment of the District Court.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals took jurisdiction under 28 U.S.C. § 1292 (a)(1). The District Court had jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.,* The Civil Rights Act of 1866, 42 U.S.C. § 1981, and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*

QUESTION PRESENTED

Whether the trial court's order denying certification of a class in an employment discrimination suit brought under 42 U.S.C. §§ 1981 and 2000e, *et seq.,* is an appealable order under 28 U.S.C. § 1292(a)(1)?

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1), provides in pertinent part:

"(a) The Courts of appeals shall have jurisdiction from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

STATEMENT OF THE CASE

On December 26, 1973 a complaint, alleging violations of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.,* was filed against Sunset, Golden Gate, Sanitary Truck Drivers and Helpers Union, Local 350 of the International Brotherhood of Teamsters, and the Teamsters International Union by 24 named plaintiffs. They simultaneously filed a motion for preliminary injunction which was subsequently denied. On July 15, 1974 plaintiffs filed their first amended complaint adding allegations of violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.,* and three more named plaintiffs.

Thereafter the parties engaged in extensive discovery, and in an order dated April 4, 1975, a trial date was set by the District Court for August 11, 1975.

Approximately two months after the trial court set the case for trial, plaintiffs, on May 29, 1975, filed their motion for class action determination pursuant to Rule 23(c)(1), Federal Rules of Civil Procedure.

The hearing on plaintiff's class certification motion was held on June 20, 1975, at which time the District Court orally announced its decision to deny the motion on grounds of numerosity and for the same reasons articulated in its order in

Gay v. Waiters and Dairy Lunchmen's Union, Local 30, 10 FEP Cases 864 (N.D.Cal. 1975). (Appendix D).*

In a written order dated August 18, 1975 (Appendix C), the Court stated in pertinent part:

> "The Court having read and considered the memoranda filed by the parties; having heard and considered oral arguments of counsel for the parties, and good cause appearing therefor;
>
> * * *
>
> "3. Plaintiffs' motion for Class Action Determination pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is DENIED for failure to meet the numerosity requirement; . . ."

On September 15, 1975 plaintiffs filed their Notice of Appeal; they made no application to the trial court for certification of an interlocutory appeal under 28 U.S.C. § 1292(b).

The question of the appealability of the District Court's order was extensively briefed and argued before the Ninth Circuit. The Ninth Circuit disposed of the question by referring to its opinion in the companion case argued the same day, *Gay v. Waiters and Dairy Lunchmen's Union Local 30:*

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*The transcript of the June 30, 1975 hearing contains the following comments by the Court:

> "THE COURT: Well, I have reviewed this matter and I am going to follow the same reasoning I have in Gay versus Waiters [and Dairy Lunchmen's Union], which is a case that I have that is similar to this, and I think the reasoning in that case is controlling. Briefly, that the rules of civil procedure, among other things, [require] plaintiffs to show the classes are so numerous that joinder of all members is impractical and I don't think that this case is such a complex case or of such a magnitude that it requires a class action and that the plaintiffs have failed to carry the burden of proof on this issue. The case involve[s] two relatively small companies [and] a small union and, as I say, the rationale in the Gay versus Waiters, which I am adopting, should apply to this case. I will deny the certification for a class action."

> "For the reasons expressed in this court's opinion in the companion case of *James Gay et al. v. Waiters and Dairy Lunchmen's Union, Local No. 30, et al.,* No. 75-2197, decided this date, we reverse and remand for re-determination of class certification in light of the broad remedial purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq." (Appendix A, page 2)

The "reasons" expressed in *Gay,* supra, by which the Ninth Circuit disposed of the appealability question were set out in two short sentences:

> "The threshold issue is whether this court has jurisdiction to review the district court's order denying class certification. We conclude that denial of class certification forecloses the broad injunctive relief sought on behalf of the class, thus conferring jurisdiction in this court pursuant to 28 U.S.C. 1292(a)(1). *Price v. Lucky Stores, Inc.,* 501 F.2d 1177 (9th Cir. 1974); *Spangler v. United States,* 415 F.2d 1242 (9th Cir. 1969); *Inmates of San Diego Jail v. Duffy,* 528 F.2d 954 (9th Cir. 1975)." (footnotes omitted) (Appendix B, page 4)

REASONS FOR GRANTING THE WRIT

A. The Circuits Are in Conflict.

The Ninth Circuit's holding that the denial of a class determination motion in an employment discrimination action is an appealable order under 28 U.S.C. § 1292(a)(1) conflicts with decisions of the District of Columbia Court of Appeals and the Seventh Circuit Court of Appeals.

In *Williams v. Mumford,* 511 F.2d 363 (D.C.Cir. 1975), *cert. denied,* 423 U.S. 828 (1975), the Court of Appeals for the District of Columbia held in a Title VII case that it was without jurisdiction to entertain an appeal from a district court order denying class certification. In response to the argument that the order denying class certification results in a denial of injunctive relief and is thus appealable under 28 U.S.C. § 1292(a)(1), the D.C. Circuit stated, 511 F.2d at 369:

"It is argued that the net effect of the refusal to certify a class action is considerably to narrow the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits. Appellants cite in support of their position two cases from other Circuits: Brunson v. Board of Trustees and Yaffee v. Powers. Both cases are premised on the assumption that the refusal to certify a class action, since it would eventually affect the scope of equitable relief, itself constituted a modification of or a refusal to issue an injunction. *We view this as an unwarranted expansion of the statutory language*. By analogy to the reasoning of these courts, most procedural motions in an action requesting equitable relief would be appealable by either party. In this view we are supported by the Second Circuit. In its opinion in City of New York v. International Pipe and Ceramics Corp., [410 F.2d 295 (2d Cir. 1969)], it rejected the argument that a refusal to certify a class action is appealable under section 1292(a)(1). The court noted, as do we, that the denial of class action treatment constitutes neither issuance nor denial of an injunction."
(footnotes omitted and emphasis added.)

The Seventh Circuit also finds the denial of a class action motion in Title VII cases non-appealable. In *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915 (1976), *cert. granted on another issue, United Air Lines, Inc. v. McDonald* (No. 76-545, December 6, 1976, argued March 29, 1977), in reviewing the district court's denial of class allegations on appeal *after* a final judgment had been entered, the Seventh Circuit noted, 537 F.2d at 917, n. 3:

> "On December 27, 1972, we refused to grant leave to appeal from the district court's December 6, 1972, interlocutory order striking the class allegations, so that an appeal first became appropriate after the district court's final order of October 3, 1975. *The denial of the class allegations was not appealable earlier.*" (emphasis added)

B. The Decision Below Will Result Inevitably in Disruption of Trial Court Proceedings in Title VII Cases and Will Emasculate Rule 23.

If the Ninth Circuit decision remains uncorrected, it will stand as a beacon inviting every Title VII plaintiff who unsuccessfully moves for certification of a class to file an appeal, the inevitable result of which will be to disrupt the orderly progress of the case in the trial court. Nor would the resulting chaos be limited to Title VII cases; it would perforce include any potential class action in which injunctive relief is sought. Indeed, it would constitute an invitation spuriously to seek injunctive relief simply as an avenue for early appeal. It will add to the delay, expense and further crowding of the dockets at all levels of the federal court system.

At the same time, the rule laid down by the Ninth Circuit usurps a district court's inherent power in the exercise of its discretion to manage and control the litigation before it. Trial courts will be loath to deny class certification even in cases, such as the present one, where a class is improper. The inevitable effect of such a rule is to emasculate Rule 23 by creating a presumption of a class and shifting to the party opposing the class the burden of establishing the absence of requisite Rule 23(a) elements, thus turning the rule upside down.

Indeed, this Court has already disapproved the reflex certification of a class in a Title VII case just because it *is* a Title VII case. We refer, of course, to the Court's language in *East Texas Motor Freight v. Rodriguez et al.*, Nos. 75-651, 75-715, and 75-718, decided May 31, 1977, 45 U.S.L.W. 4524, 4527:

> "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. *But careful attention to the requirements of Fed.Rule Civ. Proc. 23 remains nonetheless indispensible.* The mere fact that a complaint alleges racial or

> ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." (emphasis added)

If the Ninth Circuit's decision remains uncorrected, then there is nothing to prevent plaintiffs in this case from appealing *again* if the trial court persists in its refusal to certify a class. Moreover, on principles of mutuality, there will be nothing to prevent *defendants* from appealing if the trial court *does* certify a class.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be granted.

DATED: San Francisco, California, June 9, 1977

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Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 75-3114

William Roberts, et al.,
Plaintiffs-Appellants,

vs.

Golden Gate Disposal Company, et al.,
Defendants-Appellees.

MEMORANDUM

[March 11, 1977]

Appeal from the United States District Court
for the Northern District of California

BEFORE: HUFSTEDLER and GOODWIN, Circuit Judges, and FITZGERALD,* District Judge.

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. The 27 named plaintiffs are black and Spanish-surnamed persons who are either past or present employees of the defendant companies as well as past or present members of the defendant union. Defendants Golden Gate Disposal Company and Sunset Scavenger Corporation are engaged in the business of garbage collection in San Francisco. Defendant Local 350 of Sanitary Truck Drivers and Helpers Union, International Brotherhood of Teamsters, is the bargaining representative for all the employees of Sunset and Golden Gate.

The amended complaint, filed July 15, 1974, alleges that defendants Golden Gate, Sunset, and Local 350 maintain employ-

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*Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

ment practices which discriminate on the basis of race and national origin with respect to hiring, promotions, job classifications, pay classifications, pension benefits, and opportunities to purchase stock in the defendant companies. Plaintiffs seek injunctive relief prohibiting the alleged unlawful practices and requiring the establishment of non-discriminatory employment practices and awarding back pay.

After certain discovery had been conducted plaintiffs applied to the district court for certification of a plaintiff class consisting of all black and Spanish-surnamed persons who (1) are present employees of Sunset and Golden Gate, (2) are former employees, (3) were in the past or may in the future be denied employment by Sunset or Golden Gate, (4) are future employees of Sunset and Golden Gate, and (5) are members of the union.

By order dated August 30, 1975, the trial judge denied plaintiffs' motion for class certification on the ground that plaintiffs had not satisfied the "numerosity" requirement of Fed. R. Civ. P. 23(a)(1).[1] This appeal is taken from that order.

For the reasons expressed in this court's opinion in the companion case of *James Gay et al. v. Waiters' and Dairy Lunchmen's Union, Local No. 30, et al.*, No. 75-2197, decided this date, we reverse and remand for re-determination of class certification in light of the broad remedial purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

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1. It is apparent from the record that the trial judge relied on the reasoning of his prior ruling denying class certification in Gay v. Waiters' and Dairy Lunchmen's Union, 10 FEP Cases 863 (N.D. Calif. March, 1975).

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 75-2197

14 FEP Cases 995

James Gay; Leonard Whitman; Douglas Lee and Frederick McDowell, on behalf of themselves and all persons similarly situated,

Plaintiffs-Appellants,

vs.

Waiters' and Dairy Lunchmen's Union, Local No. 30; the St. Francis Hotel Corporation, and Alioto's No. 8 Restaurant,

Defendants-Appellees.

OPINION

[March 11, 1977]

Appeal from the United States District Court
for the Northern District of California

BEFORE: HUFSTEDLER and GOODWIN, Circuit Judges, and FITZGERALD,* District Judge.

FITZGERALD, District Judge:

In March of 1973 four black waiters commenced this suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., and the Civil Rights Act of 1866, 42 U.S.C. 1981, against Waiters' and Dairy Lunchmen's Union, Local 30, the St. Francis Hotel Corporation, and Alioto's No. 8 Restaurant seeking relief from the defendants' alleged racially discriminatory employment practices in the San Francisco restaurant trade.

Plaintiffs alleged that the defendants' employment policies and practices resulted in long-standing, systematic discrimination af-

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*Honorable James M. Fitzgerald, United States District Judge for the District of Alaska, sitting by designation.

fecting all blacks who sought or had gained membership in Local 30 or who sought or gained employment as waiters with the employer-defendants. The suit was brought as a Rule 23(b)(2) class action on behalf of all past, present, and future black waiters and sought back pay and broad injunctive relief to redress the discriminatory practices suffered by the class.

The trial court denied plaintiffs' motion for class certification in an opinion and order dated March 19, 1975. This appeal is taken from that order.

The threshold issue is whether this court has jurisdiction to review the district court's order denying class certification. We conclude that denial of class certification forecloses the broad injunctive relief sought on behalf of the class,[1] thus conferring jurisdiction in this court pursuant to 28 U.S.C. 1292 (a)(1).[2] *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974); *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969); *Inmates of San Diego Jail v. Duffy*, 528 F.2d 954 (9th Cir. 1975).

We pass, therefore, to the central issue, the denial of class certification. The district court rejected class certification because plaintiffs failed to prove that potential class members were so numerous that joinder would be impractical as required by F.R.C.P. 23 (a)(1).[3] Although plaintiffs identified 184 potential plaintiffs,[4] the district court concluded that in light of the liberal

1. We do not decide here whether an individual in a Title VII action might obtain relief which benefits non-parties and is broader than that necessary to protect his own individual interests. *Cf.* Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972).

2. 28 U.S.C. 1292(a)(1) provides: "(a) The court of appeals shall have jurisdiction of appeals from (1) Interlocutory orders of the district courts. . .granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ."

3. Each of the requirements of Rule 23(a) must be met before a class action can be maintained. The first prerequisite is that the class be "so numerous that joinder of all members is impracticable."

4. Black men who were members of the union at any time between January 1, 1966 and July 3, 1974.

pleading and joinder rules of federal courts it was not impractical to proceed by joining individual plaintiffs. The court reasoned that the number of potential class members listed by the plaintiffs would be reduced in part since any claims prior to March 28, 1973, would be time-barred. The court recognized that there might be more members in the classes for which certification was requested but refused to assume the existence of other potential plaintiffs without proof.[5] The court then suggested as an alternative to class certification, that all purported eligible class members be given notice of the action and an opportunity to intervene.[6]

The decision to grant or deny class action certification under Rule 23 is within the trial court's discretion and will be reversed on appeal only if an abuse of discretion is shown, *Price v. Lucky Stores, Inc., supra,* at 1179; or if the trial court has applied impermissible legal criteria or standards, *Carey v. Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974).

The trial court's opinion recognized that the number of potential members in a purported class should not alone determine whether the class should be certified.[7] We believe, however,

5. *But see* Senter v. General Motors, 532 F.2d 511, 523 (6th Cir. 1976). In ruling on a class action a judge may consider reasonable inferences drawn from facts before him at that stage of the proceedings and an appellate court will generally defer to the district court's determination that the class is sufficiently numerous as to make joinder impractical.

6. The efficacy of this alternative may be doubtful in light of Pan. Am. World Airways, Inc. v. U. S. Dist. Ct., C.D. Calif., 523 F.2d 1073 (9th Cir. 1975).

7. Certification of a class under Rule 23 has been granted many times on lesser numbers than in the present case. Typical is Sagers v. Yellow Freight System, Inc., 529 F.2d 721 (5th Cir. 1976): "First, the union alleges that the numerosity requirement of Rule 23 (a)(1) has not been met. This argument is frivolous. The affidavits and answers to plaintiffs' interrogatories submitted by Yellow Freight established that as of May 12, 1972, Yellow Freight employed approximately 130 blacks (excluding road drivers) at Southern Conference terminals. Since approximately 20 were hired after July 1, 1971, there appear to be approximately 110 members of the class, clearly a sufficient number to meet the numerosity requirements of Rule 23 (a)(1)."

that this factor was unduly emphasized in denying class certification in this case. More importantly, the district court erred in failing to consider the broad remedial purpose of Title VII.

The Supreme Court recently held that a trial court's discretion to refuse to award back pay to successful plaintiff class members in a Title VII case is circumscribed by the broad remedial purpose of Title VII, "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Abemarle v. Moody,* 422 U.S. 405 (1975). Similarly, we believe that a trial court's discretion to determine whether a Title VII action shall proceed as a class action is limited by the Congressional purpose expressed in the Act.

Employment discrimination based on race, sex, or national origin is by definition class discrimination. *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496 (5th Cir. 1968). Since the purpose of Title VII is to eliminate such class based discrimination, class actions are favored in Title VII actions for salutary policy reasons.

Other circuits have considered the issue of class litigation of Title VII claims[8] and have reached the conclusions that class actions are consistent with the broad remedial purpose of Title VII.

For example, in *Romasanta v. United Airlines, Inc.,* 537 F.2d 915, 918 (7th Cir. 1976), the Seventh Circuit reversed the trial court's denial of class certification in a Title VII case, concluding that:

8. Cases considering the issue include: Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968); Bing v. Rodway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Senter v. General Motors, 532 F.2d 511 (6th Cir. 1976).

> Because the Civil Rights Act of 1964 attacks class based discrimination, it is particularly appropriate that suits to remedy violations of the Act be brought as class actions.

As a further example, in *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974), the Fifth Circuit said:

> The plaintiff class representatives, of course, must establish that the action meets the requirements of Rule 23 (a) ... But the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and Section 1981 ... Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong . . . And a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated" . . . [citations omitted]

In *Rich v. Martin Marietta Corp.,* 522 F.2d 333, 340 (10th Cir. 1975), the Tenth Circuit reached a similar conclusion in holding that the scope of the plaintiff class had been unduly limited:

> Class actions are generally appropriate in Title VII employment discrimination cases. The reason for this is that although these suits are self-help, so to speak, actions, they also have a broad public interest in that they seek to enforce fundamental constitutional principles as well as to advance the rights of the individual plaintiffs who bring the action.

Moreover, the legislative history of Title VII shows that Congress itself recognized the importance of class actions by private litigants in accomplishing the statutory purpose of eliminating discrimination in employment. In the course of enacting the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, the House of Representatives passed a bill which prohibited class action lawsuits for back pay. The Senate Committee recommended against such a limitation on class actions stating:

> The [Senate] Committee agrees with the courts that Title VII actions are by their nature class complaints and that any restrictions on such actions would greatly undermine the effectiveness of Title VII.
> Senate Report 92-415, 92d Congress, p. 27. *See also* 118 Cong. Rec. 4942 (1972).

The Senate passed the bill without limitation on class actions and the Senate's position was adopted by the Conference Committee. 118 Cong. Rec. 7168, 7565. The bill was enacted by Congress as reported by the Conference Committee. *Id.*, at 7170, 7573.[9]

Based on the foregoing, we conclude that in determining whether an action alleging discriminatory employment practices shall be allowed to proceed as a class action, a trial court must consider the broad remedial purposes of Title VII and must liberally interpret and apply Rule 23 so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination.

Since, in the instant case, the district court failed to consider the broad remedial puruposes of Title VII and applied Rule 23(a)(1) in an unduly restrictive manner, the denial of class certification is reversed and the case is remanded for re-determination of class certification consistent with this opinion.

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9. The Supreme Court relied on this excerpt of the legislative history of Title VII in Abemarle Paper Co. v. Moody, supra, 422 U.S. 414 n. 8.

Appendix C

In the United States District Court
for the Northern District of California

No. C 73 2320 SC

William Roberts, et al.,
Plaintiffs,

vs.

Golden Gate Disposal Company, Sunset Scavenger Corp., Teamsters Union Local 350 of Sanitary Truck Drivers and Helpers Union, and International Brotherhood of Teamsters,
Defendants.

ORDER

[August 20, 1975]

The following matters filed herein by Plaintiffs came on regularly for hearing on June 20, 1975:

1. Motion to Vacate this Court's Order dated October 21, 1974, striking Plaintiffs' claim for punitive damages;
2. Motion for Class Action Determination;
3. Demand for Jury Trial.

And the Motion of defendant SUNSET SCAVENGER COMPANY adopted by defendant GOLDEN GATE DISPOSAL COMPANY, for reconsideration of this Court's ruling on Plaintiffs' motion to vacate the Court's Order of October 21, 1974, came on regularly for hearing on July 11, 1975.

And the request of defendant SUNSET SCAVANGER COMPANY for determination of the applicable statutes of limitation came on regularly for hearing on July 11, 1975;

And Plaintiffs' motions to compel answers to interrogatories previously served upon defendants SUNSET SCAVENGER COMPANY and GOLDEN GATE DISPOSAL COMPANY came on regularly for hearing on July 11, 1975;

The Court having read and considered the memoranda filed by the parties; having heard and considered oral arguments of counsel for the parties, and good cause appearing therefor;

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to vacate the Court's Order of October 21, 1974, striking plaintiffs' allegations and prayer for punitive damages under the Civil Rights Act of 1866, 42 U.S.C. § 1981, is GRANTED;

2. Plaintiffs' motion to vacate the Court's Order of October 21, 1974 striking plaintiffs' allegations and prayer for punitive damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, *et seq.*, is DENIED;

And, further the motion of SUNSET SCAVENGER COMPANY for reconsideration of the Court's ruling of June 20, 1975 concerning plaintiffs' right to claim punitive damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, *et seq.*, is GRANTED;

3. Plaintiffs' motion for Class Action Determination pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is DENIED for failure to meet the numerosity requirement;

4. Plaintiffs' demand for a jury trial is GRANTED only as to the issue of punitive damages which may be awardable under 42 U.S.C. § 1981; and DENIED as to all other issues;

5. A ruling on the request of defendant SUNSET SCAVENGER COMPANY for determination of the applicable statutes of limitation is deferred pending the filing by defendants herein, or any of them, of subsequent motions raising the limitations issue as to any named plaintiff;

6. Plaintiffs' Motion to Compel Answers to Plaintiffs' Interrogatories to Sunset Scavenger Corporation numbers 15(d), 17, 19, 22(d), 32, 33, 34(l), and 34(m) is DENIED;

7. Plaintiffs' Motion to Compel Answers to Plaintiffs' Interrogatories to Golden Gate Disposal Company numbers 14(i), 14(k), 15(d), 15(f), 16, 17, 19(c), 26, 34, and 40 is DENIED;

8. Plaintiffs' Motion to Compel Answers to Plaintiffs' Interrogatories to Sunset Scavenger Corporation numbers 4(a)(b), 9, 10, 11, 12, 13, 14, 14(k), 34(b)(c)(d), 53, 54, 56, 57, 58, 59, 60, 63, 64, and 65 is granted subject to a protective order; said interrogatories to be answered by September 11, 1975. Sunset is required to furnish information only for the period since 1962; and in the event records are to be furnished in lieu of specific answers pursuant to FRCP, Rule 33(c), Sunset shall identify the documents which contain the information;

9. Plaintiffs' Motion to Compel Answers to Plaintiffs' Interrogatories to Golden Gate Disposal Company numbers 4(a)(b), 9, 10, 11, 12, 13, 45, 46, 47, 48, 49, 50, 54 and 55 is granted subject to a protective order; said interrogatories to be answered by September 11, 1975. Golden Gate Disposal Company is required to furnish information only for the period since 1962; and in the event records are to be furnished in lieu of specific answers pursuant to FRCP, Rule 33(c), Golden Gate shall identify the documents which contain the information.

Dated: Aug. 18, 1975

SAMUEL CONTI
JUDGE, UNITED STATES DISTRICT COURT

Appendix D

United States District Court
Northern District of California

No. C-73-489 SC

James Gay, et al.,

Plaintiffs,

vs.

Waiters' and Dairy Lunchmen's Union, Local No. 30, et al.,

Defendants.

ORDER

[March 19, 1975]

This case is a Civil Rights action alleging racial discrimination by various San Francisco restaurants and local unions in the hiring, recruitment and general employment of Black waiters. Although filed as one case, the instant litigation more closely resembles a consolidation of five separate cases which involve some overlapping of parties and are held together by common involvement in the pervasive union system through which employment as waiters in San Francisco's major hotels and restaurants is largely regulated. The sub-cases here joined can be summarized as follows:

(1) Plaintiffs Gay, Whitman and Lee allege that defendants Waiters' and Dairy Lunchmen's Union Local No. 30 (Local No. 30), the Hotel Employers Association of San Francisco (Employers), and the Golden Gate Restaurant Association (Golden Gate) have engaged in racial discrimination in the design and implementation of the hiring system for professional waiters in San Francisco;

(2) Plaintiffs Gay and Whitman allege racial discrimination in the employment practices of defendant The Hyatt Corporation (Hyatt) and in the hiring through co-defendants Local No. 30 and Employers;

(3) Plaintiff McDowell asserts similar allegations against the Fairmont Hotel Company (Fairmont) with co-defendants Local No. 30 and Employers and

(4) Against the St. Francis Hotel Corporation (St. Francis) with co-defendants Local No. 30 and Employers; and

(5) Plaintiff Gay alleges parallel claims against defendant Alioto's No. 8 Restaurant (Alioto's) and co-defendants Local No. 30 and Golden Gate.

Each sub-case states that specific acts of racial discrimination have been practiced on named plaintiffs by the respective defendants and that the discrimination suffered is typical of and part of a larger scheme of illegal discrimination by each defendant. Wherefore, each plaintiff seeks to bring suit not only on his own behalf but also on behalf of "all persons similarly situated."[1]

The issue presently before this court is whether class certification is to be granted so that the named plaintiffs in sub-cases 1, 2, 4 & 5 are authorized to proceed as representatives of a larger class. In general, the classes for which certification is being requested would, if granted, consist of all Black waiters who have been, are, or will be subject to or injured by the alleged racially discriminatory practices, or who might be discouraged from applying for employment in the San Francisco waiters' market or at one of the named defendant restaurants due to such practices. The prayer for relief sues for an injunction and monetary damages (generally consisting of back pay) for the named plaintiffs and for each member of the class they seek to represent.

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1. The plaintiffs seek to define and elaborate upon the terms "all persons similarly situated" in a slightly different manner as regards each subcase. Because of this court's ruling on the request for class certification, it is not necessary to examine each proposed elaboration in detail.

Class Certification

In order for an individual to bring a class action, a court order determining that the class action may be maintained must be obtained pursuant to F.R.C.P. 23. It is in accordance with that rule that the instant plaintiffs have moved this court for certification of their complaint as a class action.

The elements necessary to the bringing of a class action are clearly enumerated in Rule 23(a), (b)(2) and (b)(3):

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate action; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Defendants in sub-cases 1, 4 and 5 have filed extensive briefs in opposition to their respective plaintiffs' requests for certification. Although the theories of opposition differ among the briefs, a common ground of opposition is found in defendants' contentions that the present case should not properly be brought as a class action since the plaintiffs' claims against each defendant reflect merely alleged isolated acts of discriminatory conduct and do not represent any across-the-board discriminatory practices. Additionally, each of the requirements enumerated under Rule 23 is challenged in one or more of the briefs filed in opposition, which also suggest less obvious theories which assertedly would require denial of the plaintiffs' request for certification.

In light of the fact that this court finds that the initial requisite under Rule 23(a) has not been proven to be present in the instant case, a discussion of defendants' alternative challenges to certification will not be considered here.

Rule 23(a)(1) expressly requires that in order for class certification to be justified, the members of the class must be "so numerous that joinder of all members is impracticable". The "numerosity" or "impracticability" requirement has received apparently inconsistent interpretation and application by the courts. An analysis of the relevant cases reveals that the criterion is to be applied by the courts on a case by case basis since there are no guidelines or arbitrary rules which dictate the minimum number of members which can be joined into a class for certification. See *Cypress v. Newport News General & Non-Sectarian Hospital Ass'n.*, 375 F.2d 658 (4th Cir. 1967). The range in size of classes that have been recognized has been considerable, with the only clear rule being that the class cannot be so small that all members can easily be joined. Cf. *Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970). Courts have denied

certification of class standing to groups as large as twenty or twenty-five, Wright and Miller, Federal Practice and Procedure, ¶ 1762 at 597-98, and have even ruled that purported classes of 126 potential members, *City and County of Denver v. American Oil Co.*, 53 F.R.D. 620, 638 (D.C. Col. 1971), and of 350 potential members, *Utah v. American Pipe and Construction Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969), did not make joinder of all members impracticable. On the other hand, the courts have certified classes composed of fifty or fewer members. See Wright, supra, at 598-99. It is thus apparent that the mere number of potential members in a purported class is not determinative and that other factors and circumstances will be considered by the courts in determining whether joinder is impracticable.

> "The obvious inconsistency of many of these cases when they are viewed solely from the perspective of the number of class members involved graphically demonstrates that caution should be exercised in relying on a case as a precedent simply because it involves a class of a particular size. A variety of facts, including the nature of the action, the size of the individual claims, and the location of the members of the class or the property that is the subject matter of the dispute may have led to a court's decision under Rule 23(a)(1) in a given case." (Footnotes omitted) Wright, supra, at 600.

This court is of the opinion that the plaintiffs have not met their burden of proof in demonstrating that the joinder of all legally eligible potential class members will be impracticable in the case at bar. The plaintiffs have presented this court with a list of 184[2] named individuals who are claimed to have been Black men who were members of Local No. 30 at any time between January 1, 1966, and July 3, 1974. Plaintiffs thus contend that the classes

2. Although there may conceivably be more members in the classes sought to be certified, such cannot be assumed or considered without proof by the plaintiffs.

sought to be certified in each sub-case consist of at least 184 members and that joinder of such a number of party plaintiffs would be impracticable since it would require the filing of a like number of separate complaints, summons and responsive pleadings.

We cannot accept plaintiffs' argument. Plaintiffs do not possess a realistic concept of the rules of practice before the federal courts if they honestly believe that the joinder of 184 additional parties would require such extensive duplication of filings.[3] If numerous members of the purported class do come before this court and present claims related to the case at bar, there is nothing to prevent this court from fashioning a liberal and efficient method by which said additional parties can be joined or allowed to intervene. In short, even if all purported members of the offered classes were to join in the instant action, the burden on the court would not be nearly as extensive as plaintiffs have suggested. This is particularly true if the situation is as represented by the plaintiffs, i.e., that the claims of the named plaintiffs are typical of other purported class members and that they all have been subjected to a pervasive system of discrimination.

It is further to be noted that this is not a case in which the offered class consists of a vague, but large number of members whose identities are unknown. Not only have the names of the class members already been identified, but the records of Local No. 30 will presumably be of substantial assistance in locating such individuals. To the extent that such may be viewed as burden-

3. Requiring joinder of purported members seems reasonable in a case such as the instant case where there is evidence to suggest that the actions complained of were merely isolated incidents not indicative of a broad discriminatory practice. That requirement would place a burden on plaintiffs to demonstrate that their complaints are not isolated, a burden which seems reasonable under such circumstances, and particularly where the purported members have already been identified and can be contacted more easily. If notification does bring forth a large, unmanageable number of individuals who seek to intervene as plaintiff, it is within the authority of this court to reconsider and grant certification.

some, it must be remembered that if plaintiffs prevail as they contend, similar, if not more elaborate efforts, would be required in attempting to notify the members of the class that a judgment in their favor had been issued.

Plaintiffs also suggest that joinder of other class members would be impracticable since it would require a long line of witnesses consuming precious court time. Such a suggestion seems somewhat inconsistent with other positions taken by the plaintiffs. The record in this case to date would indicate that plaintiffs will attempt to prove an across-the-board application of racial discrimination by various defendants through statistical analysis. To the extent plaintiffs rely on such evidence, no testimony by party plaintiffs will be necessary. If, on the other hand, proof of general employment discrimination is to be offered through testimony of allegedly injured Black waiters, then the testimony of additional Black waiters would apparently be relevant, if not required, anyway.[4] It should further be noted that this court may cut short testimony which is merely repetitive or otherwise limit testimony so as to make trial more manageable.

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4. The court questions whether or not testimony by or evidence in regard to each purported class member might not be required in any case, at least as regards the issue of damages. The court's concern stems from the unusually complicated nature of the damages issue presented by this case. The case at bar is not typical of the usual class action suit in which the members are all employees (or potential employees) of a single employer and whose back pay can thus reasonably be calculated by a simple formula or similar method. The instant case is complicated by the fact that each member is simultaneously suing four potential employers, among whom projected earnings may vary considerably, and by the inherent nature of the waiting profession, where a substantial portion of one's earnings is derived from tips, which may be as much a function of an individual waiter's personality as of experience or skill. Further, a purported class member cannot claim damages against all four restaurant defendants for the same period of time and may be precluded from recovering during a period of time in which he was employed by one of the defendants or in a comparable job. It is not suggested that mere complexity in the calculation of damages should be allowed to frustrate a request for class certification, but the difficulties in the instant case suggest that it may be necessary to call many, if not all, purported class members as witnesses.

One further important point remains to be made on the issue of "impracticability". Although the above discussed considerations indicate that class certification should be withheld in the instant action, those considerations are strengthened significantly by the fact that the number of purported members offered by plaintiffs is obviously too high. The 184 names presented to this court represent individuals who were Black members of Local No. 30 as early as 1966. However, as plaintiff has previously argued and as this court has previously ruled, the proper statute of limitations as applied to the claims in this case is three years.[5] This case was filed March 28, 1973; therefore, the statute of limitations forecloses suits based on allegedly illegal acts which occurred before March 28, 1970. To the extent the list of Black waiters offered by the plaintiffs includes the names of individuals who have been discriminated against only previously to that date, the list is overstated. This court is forced to conclude that the 184 numbered class members is excessive. Although it cannot be said whether the 184 should be reduced by half or some other fraction, it is clear that the size of the qualifying members in the proffered class is likely to be significantly smaller than plaintiffs would have this court believe. In short, plaintiffs have failed to meet their burden in proving that it would be impracticable to proceed in the case at bar without certifying the purported class.

Although not directly determinative of whether the "numerosity" criterion of Rule 23(a)(1) has been met, an examination of the requirements under Rule 23(b) suggests a position consistent with this court's conclusion that class certification should not be granted in the case at bar. Plaintiffs have brought their actions under Rule 23(b)(2) which indicates that a class action

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5. Title VII claims are somewhat more restrictive in that 42 U.S.C. § 2000e-5(a) limits availability of back pay to claims accruing two years prior to filing a charge with the EEOC.

may be maintained if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." There is no doubt that the case at bar prays for an injunction as an integral part of the relief sought. However, it must also be noted that the relief requested includes a prayer for damages (including back pay) and that determination of appropriate damages could constitute the most complex issue of the case. Normally, a class action which prays for damages must meet the stricter elements of Rule 23(b)(3), which require inter alia that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Although the weight of authority indicates that the mere joining of a claim for damages with a claim for injunctive relief will not make qualification under Rule 23(b)(2) unavailable (see, e.g. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 801-802 (4th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-720 (7th Cir. 1969), and *Baxter v. Savannah Sugar Refining Corp.*, 350 F.Supp. 139, 141 (S.D.Ga. 1972)[6] the circumstances relating to the instant case indicate that the test provided under (b)(3) might more appropriately be applied here. As pointed out in footnote 4, the damages issue represents a substantial and perhaps the most complex element of the instant case.

If qualification is obtained under (b)(3), Rule 23(c) specified certain notification objectives must be met in order to inform class members of the pending action and to allow them to intervene or withdraw from an action which would otherwise

6. Compare, Advisory Committee Notes, 39 F.R.D. 102 (1966) which state "[subdivision (b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."

be binding upon them. It is clear that the potential recipients of damages may be entitled to similar due process protection as regards their interest in back pay.

In conclusion, it is the opinion of this court that plaintiffs have not met their burden in proving that the case at bar should be maintained as a class action. Rather, this case can be efficiently tried if all purportedly eligible class members are given notice of this action and given an opportunity to intervene. Such a procedure is consistent with that employed in *City and County of Denver v. American Oil Co.*, 53 F.R.D. 620, 638 (D.C.Colo. 1971), see also *Wilburn v. Steamship Trade Ass'n.*, 7 F.E.P. cases 1183 (D.C.Md. 1973) and *Minersville Coal Co. v. Anthracite Export Ass'n.*, 55 F.R.D. 429 (M.D.Pa. 1971).

Therefore, it is the order of this court that plaintiffs' motion for certification of various classes under Rule 23 be, and hereby is, denied, and that counsel for all parties submit a joint proposal as to how qualifying individuals can best be given notice of this action and invited to intervene.

Dated: March 18, 1975.

Samuel Conti

United States District Judge

Supreme Court, U. S.
FILED
JUL 8 1977
MICHAEL RODAK, JR., CL

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1766

SUNSET SCAVENGER COMPANY and
GOLDEN GATE DISPOSAL COMPANY,
Petitioners,

vs.

WILLIAM ROBERTS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the present petition should be denied for the reasons stated below.

ARGUMENT

I

Petitioners invite this Court to undertake a purely housekeeping function which is neither urgent nor wise in the present context.

The reasons for denying the petition are multiple. As we will demonstrate later, the existence of some conflict in the Circuits regarding the appealability issue is of no great concern in realistic terms. The present decision and the several others in accord with it are so clearly correct, and so worthy of allegiance in comparison with those to the contrary, that such conflict as truly exists is not likely to cause mischief of a dimension calling for this Court's intercession at this time. For that reason alone, the petition should be denied. However, we address now other considerations which counsel a denial even more cogently.

Petitioners exclusively pin their hopes for this Court's intercession on the conflict regarding appealability of a pretrial order denying class action certification. Near the end of the petition (p. 7), they make the bald, entirely unexplained suggestion that class treatment is "improper" here, but even that fleeting and sterile address to substance is one of a tangle of assertions concerning the supposed evils of a rule of appealability. They question only two sentences in the present decision or, more accurately, the companion opinion it makes controlling (included hereafter for the sake of simplicity in our use of "the present opinion"). Nowhere do they even attempt to debate the extensive analysis of the merits, including the conclusion that reversal and remand for redetermination are required because the District Court in denying class certification had both failed to consider the broad remedial purposes of Title VII of the subject Act and applied F.R.C.P. 23(a)(1) in an unduly restrictive manner.

In short, petitioners are not concerned with substance but aim solely at having this Court undertake a judicial housekeeping function which, if resulting in a rule of non-appealability, would leave the District Court's denial of class certification intact, without regard to its propriety. At best dubious in any context, such an approach is, we submit, transparently unsound where, as here, there is not only a lack of challenge on the merits, but the fact is that the Court of Appeals disposes of the merits in a manner guarding against dishonor to the policy or policies fundamentally at stake in the litigation.

In the last analysis, the object and the measure of appellate solicitude in this kind of case should be the vindication of the salutary and important policies sought to be advanced by Rule 23 and the statutory provisions against discrimination in employment. Class actions, significant to effective solutions in various fields, have no more vital role, perhaps, than their service in eradication of discriminatory employment practices based on race or other classwide traits. It is, indeed, with the importance of class actions in this field that the present opinion of the Court of Appeals largely deals, amply documented with the supportive teaching of this Court and others on the subject, as well as of Congress itself.

Accordingly, where, as in the case of the present opinion, pretrial determinations hospitable to class treatment are in issue, there is no compelling occasion for immediate and rigorous vigil against possible error. Such determinations, sound or not, protect in all events against premature frustration of the crucial policies fundamentally at stake. If the determinations are correct,

review at a higher level may well result only in delaying the trial and thus extending the time over which classwide discrimination in employment can be perpetuated. If such determinations are erroneous, the most that can happen from the excess of zeal in favor of class treatment is that the case will proceed to trial with aspects of overbreadth which, if managing to survive tailoring at the trial itself, can be remedied on appeal from the final judgment.

In sharp contrast, of course, stand pretrial determinations negating class treatment, whether they be in the form of a denial of certification in the first instance or of a refusal to review the denial on the ground of non-appealability. Those determinations threaten the underlying policies involved and, if erroneous, can defeat them irredeemably to some extent or even totally. Not only do they serve to predestine the narrower scope of subsequent discovery and other preparation for, presentation of proof at, and the result in the trial; they may remain uncorrected even after the trial, however erroneous and with serious consequences to class members who are not named plaintiffs, such as loss of the tolling effect of the suit upon statutes of limitations. This is so because the named plaintiffs may succeed in obtaining sufficient personal relief and, having been released from representative responsibility, may well choose not to pursue the class question on appeal from the final judgment.

It is submitted as apparent, that, with or without some conflict on the subject, the present appealability question does not rank so high in the hierarchy of national issues as to require this Court's intercession on that sole account at a preliminary stage of litigation. We note in

this connection that, recently and notwithstanding acknowledgment of conflict on the face of the opinion, this Court refused to intercede in the non-appealability case upon which petitioners mainly rely, *Williams v. Mumford,* 511 F.2d 363 (D.C.Cir. 1975), *cert. denied,* 423 U.S. 828 (1975). It is also respectfully suggested that there should be no dearth of opportunity in the relatively near future for such guidance on appealability as this Court deems appropriate in the course of resolving merits issues sufficiently important in their own right to have warranted this Court's attention. If, however, this Court is ever persuaded that the bare appealability question, without regard to merits, requires its pretrial consideration, wisdom dictates that this not occur in a context like the present one but where the holding below has been non-appealability of a denial of class certification and thus potentially frustrates the vital policies basically involved in this kind of litigation. The present opinion of the Court of Appeals, rather than militating against those policies, is conducive to their continued operation in the case. This Court's intercession now, if accomplishing nothing else of comfort to petitioners, would delay the trial inevitably and would thus be apt to contribute significantly to the longevity of practices which are alleged and may be found to constitute serious discrimination in employment. It is not amiss, indeed, to wonder whether such delay is not the very motivation of the present petition.

II

THE PRESENT HOLDING OF APPEALABILITY IS CLEARLY CORRECT

In regard to the conflict on appealability, the result in the present opinion is clearly in accord not only with preponderant authority squarely in point, but also with sound analysis under the criteria governing appealability generally.

It should be stressed that the present opinion goes no further than to hold that a denial of class certification is appealable under 28 U.S.C. §1292 (a)(1) because plaintiffs were seeking broad injunctive relief on behalf of a class, encompassing both restraint and affirmative action. That holding is, in fact, supported by the three earlier decisions of the Ninth Circuit cited in the present opinion. In addition, it is in accord with decisions of the First, Third, Fourth, and Fifth Circuits. (*Yaffe v. Powers,* 454 F.2d 1362, 1364-65 (1st Cir. 1972); *Rodgers v. United States Steel Corp.,* 508 F.2d 152, 160 (3d Cir. 1975); *Hackett v. General Host Corp.,* 455 F.2d 618, 622 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972); *Brunson v. Board of Trustees,* 311 F.2d 107, 108 (4th Cir. 1962), *cert. denied,* 373 U.S. 933 (1963); *Jones v. Diamond,* 519 F.2d 1090, 1095-97 (5th Cir. 1975).)

One important justification for this result is that the practical effect of denying class status is to eliminate parties plaintiff and thus substantially narrow the injunctive relief obtainable. For example, in the Title VII setting, the class relief sought by the named plaintiffs typically includes, as here, not only other present co-workers, but even potential co-workers. Injunctive relief tailored to the named plaintiffs will not assure protection

of other co-workers or potential co-workers. In the unlikely, if not improper, event that, notwithstanding the denial of class treatment, the named plaintiffs succeed in obtaining an injunction going beyond their own needs and sufficient to protect all parties excluded by the denial, the excluded parties would still face the obstacle of showing standing to enforce the injunction.

Moreover, without pretrial appealability, improper denials of class certification could forever evade effective review because the named plaintiffs may realize sufficient personal success at trial and choose not to appeal on the question. Thus clear is the need of pretrial appeal to protect against injustice to excluded parties with respect to such concerns as the statute of limitations. Indeed, there is, at minimum, serious doubt as to whether, even if willing to pursue the class issue on appeal after a trial of the merits, the named plaintiffs could succeed in protecting wrongly excluded members of the class. There are decisions to the effect that class status must be certified in advance of the trial on the merits or otherwise comes too late to permit members the enjoyment of benefits from such status. (E.g. *Peritz v. Liberty Loan Corp.* 523 F.2d 349, 353-354 (7th Cir. 1975); *Roberts v. American Airlines* 526 F.2d 757, 762 (7th Cir. 1975); *Larionoff v. United States* 533 F.2d 1167, 1183 (D.C. Cir. 1976).)

In short, the cases favoring appealability have simply given the provision concerning injunctive relief a "practical" rather than a "technical" construction and mirror the view that any inconvenience incident to pretrial appeal is outweighed by "the danger of denying justice by delay." In so doing, they are faithful to the tests of

appealability which this Court has declared to be controlling even in the absence of the special grant of appellate jurisdiction set forth in section 1292 (a)(1). (E.g. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 171 (1974); *Dickinson v. Petroleum Conversion Corp.* 338 U.S. 507, 511 (1950); *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949).)

III

THE DECISIONS CITED BY PETITIONERS ARE CLEARLY ERRONEOUS

On the other side of the coin, the following suffices to illustrate the ill-considered and even superficial nature of the decision mainly relied on by petitioners, *Williams v. Mumford,* 511 F.2d 363 (D.C.Cir. 1975):

That decision, rather than taking the required "practical" approach, stresses the "technical" circumstance that denial of class certification is not, as such, either the issuance or the denial of an injunction. Apparently mindless that the elimination of parties plaintiff is involved together with the danger of substantive injustice discussed above, *Williams* adds (p. 370) the now-you-see-it-now-you-don't observation that, although the denying order might, at a later stage, have an "effect on the scope of the equitable relief," such orders in no way "touch on the merits of the claim."

This unfortunate reasoning seems to have flowed from the misguided notion that the denial of class certification is like the denial of a motion for summary judgment involved in *Switzerland Cheese Association, Inc. v. Hornes' Market,* 385 U.S. 23, 24 (1966). As this Court

there stressed, summary judgment was denied merely because "unresolved" factual issues remained. Nothing occurred to eliminate parties or narrow the scope of possible relief. The denial decided only that the case must go to trial.

Virtually worthless is the footnoted statement against pretrial appealability in the other case cited by petitioners, *Romasanta v. United Air Lines, Inc.,* 537 F.2d 915, 917 n. 3 (1976). The Court there upheld the right of a class member to intervene after settlement by the named plaintiffs. The fact basically stressed was that intervention was sought promptly after awareness that the named plaintiffs had no intention of appealing a prior denial of class certification. The footnoted remark concerning appealability was nothing but a casual makeweight, with neither attempt nor need to explore the point in any depth.

IV

PETITIONERS' ASSERTIONS OF EVIL ARE SPECIOUS

In response to petitioners' specious assertions of evil, we need only note that it is not appealability, but improper denial of class certification coupled with non-appealability, which emasculates Rule 23, as well as Title VII; that due respect for trial court discretion does not depend on whether review for abuse occurs before or after trial; that pretrial rulings of other types, including orders granting class certification, do not involve the same concerns as call for appealability of denials of such certification; and that nothing of relevance here is found in the language quoted by petitioners from *East Texas*

Motor Freight System, Inc. v. Jesse Rodriguez, et al., 45 U.S.L.W. 4524, 4527, which, of course, speaks only to the point that more than an allegation in the complaint is necessary to establish the required qualification of a plaintiff to represent a class.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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July 5, 1977